Office - Supreme Court, U.S.
FILED
JAN 6 1983
ALEXANDER L. STEVAS,
CLERK

NO 82 - 6699

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CATHERINE DUERR,

Petitioner

-vs-

THE STATE OF OHIO,

Respondent

On Writ of Certiorari to the Court
of Appeals for the First Appellate District
Hamilton County, Ohio

RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

H. FRED HOEPLE

1010 Second National Building
830 Main Street
Cincinnati, Ohio 45202
(513) 241-1268

Attorney for Petitioner

OPPOSING COUNSEL:

Arthur Ney
Hamilton County Prosecutor
420 Courthouse
1000 Main Street
Cincinnati, Ohio 45202

INTRODUCTION

To the Petition for a Writ of Certiorari, Respondent has filed a reply brief in opposition. As to the second ground raised in our Petition, we see no need for a response, and stand on the Petition as originally submitted. As to the first question, however, dealing with the denial of Petitioner's right to a fair and impartial jury, the reply of the Respondent requires the following brief response:

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A QUESTION OF FIRST IMPRESSION IN THAT THE VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY EXCEEDS BOTH IN KIND AND DEGREE ANY SUCH VIOLATION HERETOFORE REPORTED IN THE ANNALS OF ANGLO-AMERICAN JURISPRUDENCE, PETITIONER HAVING BEEN FORCED TO TRIAL WITH A JURY WHICH WAS PRECONDITIONED TO FIND HER GUILTY BY THE KNOWLEDGE THAT BOTH OF PETITIONER'S CO-CONSPIRATOR-CO-DEFENDANTS HAD BEEN CONVICTED OF THE CONSPIRACY-MURDER IN WHICH PETITIONER WAS ACCUSED OF PARTICIPATING AS A CO-CONSPIRATOR.

Respondent parrots the reasoning of the Court below in urging denial of the Petition; it asserts that the decision as to whether a prospective jury in any given case is impartial, is solely a matter for the trial judge to determine in assessing the credibility of the jurors' promises that they will be fair and impartial, regardless of what they know of the case. Respondent cites Ohio Criminal Rule 24, to the effect that a prospective juror may be seated even where he has previously formed an opinion as to the guilt or innocence of the accused, so long as "the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial." Id. [Emphasis added.]

To the extent that this rule needlessly permits the impanelling of biased jurors, it is unconstitutional. The

trial court should never have the sole discretion to determine, once and for all, whether a trial juror is fair and impartial, particularly where the only evidence in support of that conclusion is the promise by the juror that he will be impartial. As we stated in our Petition, there never has been seated in an American courtroom a juror who has not promised to be fair and impartial; as we stated in the Petition, such a promise is, or should be, only the beginning, and not the end, of the inquiry as to whether the constitutional right to a fair and impartial jury is being observed.

Respondent cites two cases from this Court in support of its argument that certiorari should be denied: Murphy v. Florida, 421 U.S. 794 (1975), and Dobbert v. Florida, 432 U.S. 282 (1977). Neither should be held to apply here.

In Murphy, the defendant attacked his jury because of the great amount of pretrial publicity, which Murphy felt prejudiced his case, as the publicity detailed his exploits as "Murph the Surf," and referred to his prior convictions. He alleged that the trial atmosphere had been utterly corrupted by press coverage. Interestingly, in that case, this Court reaffirmed the principle that mere denials of prejudice by jurors provides an insufficient basis, in and of itself, for concluding that they will be fair and impartial.

In Dobbert, the accused also contended that the trial atmosphere had been corrupted by the press coverage. As the Court stated, Dobbert's argument "that the extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received. He directs us to no specific portions of the record, in particular the voir dire examination of the jurors, which would require a finding of constitutional unfairness as to the

302.

Here, however, Petitioner rests on far more than Murphy's or Dobbert's assertions that the wealth of publicity, in and of itself denied them the right to a fair and impartial jury.

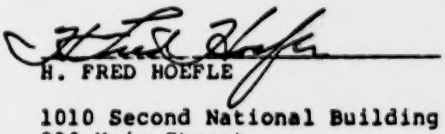
Petitioner, unlike Dobbert, did exercise all of her peremptory challenges; Petitioner, unlike Dobbert, does direct the Court to specific instances in the record, in the voir dire, where it is clear that she was denied the fair and impartial jury which is her constitutional right.

Petitioner states that the fact that all twelve of the jurors which were selected for her jury, after all peremptories had been exercised, and after the motion for change of venue was denied, were fully aware that her two co-conspirator-co-defendants had already been convicted of the conspiracy-murder with which she was charged, renders her jury unconstitutionally unfair in that the jury was preconditioned to find her guilty. The other two defendants had been found, on the same basic evidence, to have conspired with her to kill her father; if they were guilty of conspiring with her, then how could she be other than guilty of conspiring with them?

The Respondent's reliance upon Murphy and Dobbert is misplaced. For a decision of this Court more accurately reflecting the facts of this case, it would seem that Leonard v. United States, 378 U.S. 544 (1964) is more appropriate. There, the defendant was convicted of two similar crimes, and five of the jurors in the jury for the trial of the second offense were in the courtroom when the verdict of guilty on the first was announced shortly before the second trial began. Solicitor General Cox confessed error on behalf of the government, and this Court agreed, and reversed. The basis was not specifically stated, being so obvious, but the principle governing Leonard is that governing here: No person should be required to stand trial with a jury which is predisposed to find guilt because of its awareness of prior convictions, not in other, unrelated cases (as in Murphy), nor in similar cases, as in Leonard, but in the same case, involving the same offense, as that with which the accused is charged. The Constitution cannot countenance such a blatant violation of the precious right to trial by a fair and impartial jury embodied in the Sixth and Fourteenth

Amendments. The writ should be granted, the judgment below reversed, and the case remanded with instructions to grant Petitioner a new trial at which her right to trial by fair and impartial jury is scrupulously honored.

Respectfully submitted,



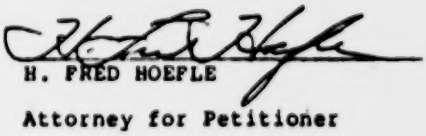
H. FRED HOEFLE

1010 Second National Building
830 Main Street
Cincinnati, Ohio 45202
Telephone (513) 241-1268

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 1983, I served a true copy of this Response on opposing counsel by leaving same at his office.



H. FRED HOEFLE

Attorney for Petitioner